MEMORANDUM ON MOTIONS FOR SUMMARY JUDGMENT

(Filed October 27, 1964)

In this class action it is set out that the named and unnamed plaintiffs are engaged in the business of selling appliances for the utilization of natural gas. The defendant, under a state franchise, has a legal monopoly to distribute natural gas in the Chattanooga area. It also sells gas appliances.

The claim of merit for relief made by the named plaintiff is under Sections 1 and 2 of the Sherman Act [15 U.S.C.A. Sections 1 and 2] and the right to maintain the action for threefold damages is based upon Section 15 of the Clayton Act [15 U.S.C.A. Section 15].

The defendant has interposed a motion for summary judgment. The named plaintiff has filed a motion for summary judgment as to liability and asked for a mandatory injunction to issue restraining the defendant from continuing the conduct charged against it.

The record upon which decision must be made, in addition to the pleadings, are: (1) Affidavit of Edward F. Davis, Sales Manager for the defendant and (2) discovery depositions taken by the plaintiff of John Inman Kidd, Secretary-Treasurer of the defendant, S. V. O'Lenic, President of defendant, and Edward F. Davis, the same person who made the affidavit.

The named plaintiff pitches its right for relief upon the proposition that the defendant is selling and servicing gas appliances below cost so as to render fair competition by the plaintiff and those similarly situated impossible and that the defendant's activities in this respect amount to an attempt to create a monopoly.

From reading all the evidence submitted in connection with the motions, there is some difficulty in determining whether there are factual questions in dispute. It will be assumed that the defendant is selling appliances at cost or cheaper and that such may unfavorably interfere with the sales by plaintiff and those similarly situated. Even so, has the defendant actually violated the parts of the anti-trust law set out as the bases of this action?

Sections 1 and 2 of the Sherman Act provide, in substance, that:

> "1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor. * * *"
>
> "2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

With regard to cases arising under Section 1 of the Sherman Act, as is set out above, suffice it to say that these cases may pose at least four main issues: (1) What proof suffices to establish that "contract, combination in the form of trust or otherwise, or conspiracy" which Section requires? (2) Does the conduct reviewed sufficiently effect "trade or commerce among the several states * * *?" (3) In what market is the effect of the challenged arrangement to be tested and what evidence is relevant in establishing that market? (4) In what relevant market does

the challenged conduct "unduly" restrain competition? Of course, there are a variety of devices which constitute unreasonable restraints under Section 1. These devices are generally divided into restraints fixing prices either directly or by controlling production and those devices which "unduly" restrain competitive opportunity or commercial freedom. Examples of the latter would be permanent combinations through mergers or vertical integration, trying arrangements conditioning the sale or lease of one product on the use of another, collective refusals to deal, forced use of standard contracts, market division among competitors, and dealership systems where there is allocated to each dealer certain exclusive privileges for a prescribed territory. Obviously, the fact situation in this case is such that it does not conform with any of the devices that constitute a violation of Section 1 of the Sherman Act. A bibliography of anti-trust cases dealing with violations of Section 1 of the Sherman Act is set out in the margin.[1]

Section 2 establishes three separate offenses which are as follows: (1) To monopolize; (2) to attempt to monopolize; and (3) to conspire with any other person to monopolize.

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[1] Dr. Miles Co. v. John D. Parks & Son Co., 220 U. S. 373;
Standard Oil of New Jersey v. United States, 221 U. S. 1;
United States v. American Tobacco Co., 221 U. S. 106;
Eastern States Retail Lumber Dealers Assn. v. United States, 234 U. S. 600;
Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441;
United States v. Trenton Potteries Co., 273 U. S. 392;
United States v. First National Pictures, Inc., 282 U. S. 44;
United States v. Colgate & Co., 250 U. S. 300;
United States v. Bausch & Lomb Optical Co., 321 U. S. 797;
International Salt Co., Inc. v. United States, 332 U. S. 392;
United States v. Columbia Steel Co., 334 U. S. 495.

The complaint especially points out that the conduct of the defendant "tends to create a monopoly." Therefore, the basic claim of the named plaintiff concerns that part of Section 2 which prohibits the attempt to monopolize. The attempt to monopolize is distinguished from the act of monopolization in that it is not necessary for the plaintiff to show that the desired end of monopoly of power was attained. However, in all such cases to date, attempts to monopolize, where the monopoly power was not achieved, there is an additional element necessary to be shown before there can be found a violation. That element is sometimes called "specific intent" or sometimes called "subjective intent to accomplish an unlawful result." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626-627; *Mackey v. Sears, Roebuck & Co.*, 237 F. 2d 869, 873, certiorari dismissed 355 U.S. 885; *United States v. Aluminum Co. of America*, 148 F. 2d 416, 431-432; *American Tobacco Co. v. United States*, 328 U.S. 781, 814.

There is a firm conclusion upon undisputed evidence that the defendant sells gas appliances only for the purpose of promoting the sale of natural gas which is its real business. The defendant has strong competition for the sale of its natural gas from the sale and distribution of electric energy by a publicly owned electric power distributor. The electric energy and the natural gas are generally utilized for the same purposes.

The record makes it clear that the defendant would be very happy to be out of the gas appliance business if the private dealers would use extraordinary effort to sell gas appliances. To accomplish this end, the defendant has offered to the private gas appliance dealers certain inducements. Of course, on the other hand, the private businesses selling gas and electrical applicances have no

reason to try to induce people to use gas rather than to use electricity.

The uncontradicted proof reveals that the defendant has no intention to attempt to monopolize the sale of gas appliances in this area. If the plaintiff and others similarly situated are entitled to relief of some kind against the defendant, it is not under Sections 1 and 2 of the Sherman Act.

The motion for summary judgment made by the plaintiff is denied.

The motion for summary judgment interposed by the defendant is granted.

Order accordingly.

Leslie R. Darr,

United States District Judge (Rt.)

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

NO. 16,327

SOUTHERN BLOWPIPE & ROOFING CO.,
Plaintiff-Appellant,

v.

CHATTANOOGA GAS COMPANY,
Defendant-Appellee.

APPEAL from the District Court for the Eastern District of Tennessee

OPINION

Decided May 6, 1966

Before WEICK, Chief Judge, O'SULLIVAN, Circuit Judge, and CECIL, Senior Circuit Judge.

O'SULLIVAN, Circuit Judge. This cause presents the appeal of plaintiff-appellant, Southern Blowpipe & Roofing

Company, from the entry of a summary judgment in favor of defendant-appellee, Chattanooga Gas Company, in the United States District Court for the Eastern District of Tennessee, Southern Division. Appellant sells and installs gas equipment and appliances in the area of Chattanooga, Tennessee. Its complaint purports to assert a cause of action for itself and on behalf of other sellers and installers of gas equipment and appliances in the Chattanooga area. Appellee is a public utility with an exclusive franchise to supply gas to consumers in the same area. Appellant's complaint avers that appellee utility competes with it, and other Chattanooga installers and dealers, in the sale and installation of appliances and equipment used in the consumption of gas supplied by the utility. It charged that in methods of sale, service and installation of gas equipment and appliances, the Gas Company has been guilty of violating the Sherman Anti-Trust Act, 15 U.S.C. Sections 1 and 2.

The District Judge heard the matter upon competing motions for summary judgment, having before him an affidavit supporting defendant's motion, and also the discovery depositions of defendant utility's representatives. Appellant offered no affidavit or other evidentiary opposition to the factual content of defendant's affidavit and the depositions. The District Judge concluded that the undisputed facts failed, as a matter of fact and law, to expose any violation of the Sherman Act by appellee-defendant.

The District Judge's opinion appears to assume that the total thrust of appellant's complaint was that appellee Gas Company was involved in an "attempt to monopolize." He concludes that the undisputed facts as set out in the

defendant's affidavit and the discovery depositions disclose that the Gas Company's conduct could not be viewed as a deliberate attempt to create a monopoly. These facts, however, do not negative an inference that what the Gas Company was doing could, and very probably would, inevitably result in the Gas Company obtaining a monopoly on the sale of all appliances using gas as a source of power. The Gas Company deponents testified that its primary objective was to multiply the number of users of gas; in this effort the Gas Company was opposed by strong competition from TVA electric power; that before it could sell its gas it had to persuade prospective consumers of the economic advantage of gas and an initial consideration of a prospective user was the cost of acquiring and installing the gas consuming appliance. To gain the custom of such users, the Gas Company offers appliances to them at less than its own cost of acquisition and installation. Appellee's sales manager stated "the company does make a profit on more than 90% of its sales, *aside from promotional expenses*." (Emphasis added.) It is clear, however, that had a proper share of this "promotional expense" been charged to the sale and installation of appliances, it would demonstrate that the customer acquires his appliance for less than the Gas Company's cost. This loss, however, is recouped, we assume, when the Gas Company's rates are set on the basis of its total costs, including the "promotional expense."

The District Judge assumes the foregoing by his recital, "It will be assumed that the defendant is selling appliances at cost or cheaper and that such may unfavorably interfere with the sales by plaintiff and those similarly situated." There can be no quarrel with the District Judge's factual conclusion that the Gas Company did not enter or continue

its program for the purpose of monopolizing the gas appliance market. Its clear purpose is to multiply the users of its gas; it had sought to help and encourage others to sell gas appliances and had given certain free service to customers regardless of the source of their original acquisition of the gas installations.

The District Judge summarily disposed of the case entirely upon a view that the pleadings and depositions made it undisputed that the Gas Company was not attempting to monopolize and that it had not yet acquired monopoly power. He stated, relevant to attempts to monopolize, "However, in all such cases to date, attempts to monopolize *where the monopoly power was not achieved*, there is an additional element necessary to be shown before there can be found a violation. That element is sometimes called a 'specific intent' or sometimes called 'subjective intent to accomplish an unlawful result'. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626-627; *Mackey v. Sears, Roebuck & Co.*, 237 F(2) 869, 873, cert. dismissed, 355 U.S. 865; *United States v. Aluminum Co. of America*, 148 F(2) 416, 431-432; *American Tobacco Co. v. United States*, 328 U.S. 781, 814." (Emphasis supplied.)

Appellant's complaint, although leaving much to be desired as a clear portrayal of its position, did not charge merely that defendant was attempting to monopolize. It charged, inter alia, that,

> "The defendant * * * sells and installs such appliances and equipment at prices and on terms below the cost of selling and installing them *rendering competition* in the sales, installation and servicing of such appli-

ances and equipment *impossible*. In addition, the defendant is the distributor in this area for Arkla-Servel gas heating and cooling equipment, and supplies it directly to consumers at less than cost or at no charge or on such terms *as are unfair and below cost*." (Emphasis supplied.)

We believe that such allegations can be read as a charge that the defendant has already acquired a monopoly or monopoly power. Whether the proofs will sustain such a claim will depend on further evidence to be developed upon a trial. Notwithstanding the many cases that have treated the subject of anti-trust practices, we have been cited to none that deal with the question of whether a utility already possessed of a legal monopoly may, in the service of that monopoly, avail itself of the peculiarities of utility rate-making to sell below cost in an underlying field of competition. No case has considered whether a subsidiary monopoly thus obtained offends the anti-trust laws. We may also have the question of what is the relevant market in which the Gas Company and the plaintiff, and others in the appliance business, are competing and whether the defendant has, for all practical purposes, already acquired a monopoly in that market. Whether the evidence to be examined will expose such questions in the case before us can only be determined upon a trial, the limits of which can be set by the trial court. We do not now intimate a view one way or the other on the legality of the hypothesized conduct of defendant, should it be factually established, "for we believe that the applicable rule of law should be designed after trial." *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963). Under Rule 56(c) Fed. R. Civ. P., summary judgment requires not only that there be no dis-

puted facts, but that "the moving party is entitled to a judgment as a matter of law." Notwithstanding the salutary and timesaving uses of summary judgment, Judge Miller of this court took occasion to speak at some length of the restraints that should be observed in its use. *S. J. Groves & Sons Co. v. Ohio Turnpike Commission*, 315 F(2) 235, 237 (CA 6, 1963). Sparing employment of it in the complex field of the anti-trust statutes was admonished by the Supreme Court in *Paller v. Columbia Broadcasting Co.*, 368 U.S. 464, 467, 473 (1962) and *White Motor Co. v. United States*, 372 U.S. 253, 259-264 (1963).

The judgment is reversed and the case remanded for further proceedings consistent herewith.

[Caption Omitted]

PRETRIAL ORDER

(Filed February 23, 1967)

* * *

(5) CONTESTED ISSUES OF LAW: The contested issues of law, in addition to those implicit in the foregoing issues of fact, are:

(a) An issue of law exists with respect to whether the activities of the defendant complained of by the plaintiffs would constitute a per se antitrust violation or would be subject to the test of reasonableness. The Court of Appeals in its opinion stated at page 4:

> ". . . Notwithstanding the many cases that have treated the subject of antitrust practices, we have been cited to none that deal with the question of whether a utility already possessed of a legal monopoly may, in the service of that monopoly, avail itself of the peculiarities of utility rate-making to sell below cost in an underlying field of competition. No case has considered whether a subsidiary monopoly thus obtained offends the antitrust laws. . ."

* * *

EXCERPTS FROM COURT'S CHARGE

* * *

or his property proximately caused by one or more of the violations of the Federal Anti-Trust laws by the defendant and as alleged by the plaintiff. You will not treble that amount nor will you include any sum for the costs of the suit nor will you include any sum for reasonable attorney's fee, since it is the function and the duty of the Court under the laws to assess those amounts in the event that the jury returns a verdict in favor of the plaintiff in a suit of this nature. In other words, the sole function of the jury in this type of litigation in the matter of assessing damage is to assess actual damage sustained by the plaintiff as a direct and proximate result of the violations of the [571] Anti-Trust Laws and not to treble that damage nor to assess costs nor to assess attorneys' fees, for the responsibility of doing those acts being imposed by law upon the Court after the jury has returned its verdict.

Now, are there any special requests, gentlemen?

* * *

[Charge requested by plaintiff as a special request; see page 571 of record.]

One who reduces his price to below his own cost on a consistent basis, or operates in a field of endeavor with the intention of sustaining a loss, violates the Sherman Act.

Civ. 4238 Declined. F.W.W.

* * *

Anything further?

Gentlemen, I have prepared for your use a general ver-

dict form. I think it's a very simple verdict form, very clearly understandable. Let me just go over it with you and then after you have retired to consider your verdict, you will want to go over it further. You are asked to respond in this case to three issues. The first issue is as follows:

We, the jury, find the plaintiff, Southern Blowpipe and Roofing Company (and there is a blank for you to fill in your verdict—either is or is not) entitled to recover of the defendant, Chattanooga Gas Company, for a monopolization in violation of the Sherman Anti-Trust Act, that being the first theory upon which the plaintiff seeks to recover. Then second, if you find that the plaintiff is not entitled to recover for a monopolization,

We, the jury, find that the plaintiff, Southern Blowpipe

* * *

[Caption Omitted]

JUDGMENT

(Filed March 6, 1967)

This action came on for trial before the Court and a jury, the Honorable Frank W. Wilson, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is ORDERED, ADJUDGED and DECREED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Chattanooga Gas Company, recover of the plaintiff, Southern Blowpipe and Roofing Company, its costs of action.

Dated at Chattanooga, Tennessee, this ____ day of _____, 1967.

KARL D. SAULPAW, JR.
Clerk of Court

By: J. Robert Dale
Deputy in Charge

[Caption Omitted]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND FOR AN IMMEDIATE INJUNCTION

(Filed March 9, 1967)

The plaintiffs move for a judgment in their favor on the issue of liability notwithstanding the verdict of the jury, and move the Court to immediately enjoin the defendant from operating in its capacity as a franchised monopoly in the relevant markets occupied by the plaintiffs, namely (1) the bidding and contracting for the sale and installation of heating and air conditioning systems and related equipment in home, commercial and light industrial installations, and (2) the sale and installation of coin operated laundry equipment; both in the geographic area in which the defendant, Chattanooga Gas Company, operates a natural gas distribution system.

JOHN I. FOSTER, JR.
and
SIZER CHAMBLISS

By .....
John I. Foster, Jr.

[Certificate of Service Omitted]

[Caption Omitted]

ORDER

(Filed March 20, 1967)

This case is before the Court upon the motion of the plaintiffs for a judgment notwithstanding the verdict and for an immediate injunction. Having considered the motion and the briefs of the parties and the record in this cause, the Court is of the opinion that the motion should be denied.

It is accordingly ORDERED that the motion for judgment notwithstanding the verdict and for an immediate injunction, said motion filed upon behalf of the plaintiffs, be and hereby is overruled.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

[Caption Omitted]

ORDER

(Filed April 17, 1968)

Before: WEICK, Chief Judge, EDWARDS and PECK, Circuit Judges

There being substantial evidence to uphold the special jury verdicts and the judgment of the United States District Court for the Eastern District of Tennessee, Southern Division, the judgment is hereby affirmed.

Entered by order of the court

/s/ Carl W. Reuss
Clerk

Issued as Mandate: May 20, 1968

COSTS: NONE

[Caption Omitted]

ORDER

(Filed May 10, 1968)

Before: WEICK, Chief Judge, EDWARDS and PECK, Circuit Judges

On consideration of the petition for rehearing in the above-styled case, the same is hereby denied.

Entered by order of the court

/s/ Carl W. Reuss
Clerk

EXCERPTS FROM TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

* * *

Q Now, I believe—did you know about—did you help develop this business that Smith Air Conditioning has done in the last two years. Did you work with them on this installation and development of their business?

A Oh yes, not only Smith, but the rest of them too.

Q Have you, or has the Chattanooga Gas Company, rather, taken any steps that you know of to discourage in any way other contractors from getting into the heating

and air conditioning and appliance field?

A No, sir, I would like to see them doubled, I would sleep better at night.

Q This may be repetitive but have we run a training school for installers in this field for other com-
[504] panies?

A Yes, sir, we have done that for several years.

Q And what is the purpose of that?

A Well to keep them informed on our codes or methods of installations and safety precautions that codes change and they don't know about. Piping changes, and styles, we inform them of that. Clearance on bidding.

Q Well, I believe I asked you this, but prior to the time that you went into this field and developed it in 1959, '60 and '61, I believe—did I ask you whether there were any central air conditioning, heating units of gas being installed in the home market in Chattanooga?

A In '59 until '61 and '62 they were very spotted. We didn't have too many gas jobs going in but there still was a lot of electric going in.

Q Now in '66, can you tell us whether or not the outside or air conditioning, heating and dealers besides the Gas Company, installed more or less units in '66 in the new home market than the Gas Company?

A I have forgotten the figures, but I believe the dealers installed one hundred and sixty central systems and we did about one hundred and forty. I may be
[505] wrong there but the dealers did more than we did.

Q And was this business that you had developed and pushed out to them?

A I'll say ninety-five percent was what we had given them.

Q Has the Gas Company ever made any attempt to go

into the ductwork business?

A No, sir.

MR. SPEARS: That's all.

CROSS-EXAMINATION

BY MR. FOSTER:

Q Mr. Prince, what is your position? New building and working with contractors?

A Yes, sir.

Q Do you have anything to do with residential, commercial—I mean residential conversion market or—

A No, I'm in construction—

Q In 1953 did you have anything to do with the sale of gas heating units to homes?

A Not in old houses, no, sir.

Q You didn't do anything in new houses in those days? Did you say?

A We worked it, yes, sir. We tried to get the business.

[506] Q For heating units in new houses?

A Yes, not necessarily we doing the selling, we were trying to get the gas business.

Q Were you with the Gas Company before they got natural gas?

* * *

commercial and light industrial installations—has a direct impact on goods moving in interstate commerce which means across the state line. Or on goods which are in the flow of commerce, which means that the interstate journey of the goods is deemed not to have halted, whether the goods be in the destination state or on their way to the final consumer, or in the originating state awaiting shipment. If you find that the conduct here alleged operated

directly upon goods in interstate commerce or in the flow of interstate commerce, the question of how much commerce is involved is immaterial, for the law requires that only a negligible amount of commerce be involved for the requirement of interstate commerce to be satisfied. If you find that the equipment was moving in interstate commerce or in the flow of commerce and that the activities of the defendant had a direct impact upon such interstate commerce, then this requirement of the Sherman Act would be satisfied.

[557] Now, you notice that I have previously in these instructions referred to the relevant market. Let me turn your attention to that matter somewhat further at this point. The defendant, Chattanooga Gas Company, has of course a lawful monopoly in the sale and distribution of natural gas in the Chattanooga area. It has that monopoly under the public utility laws of the State of Tennessee. It is not contended that the defendant's monopoly in that market, that is the sale and distribution of natural gas, is wrongful or that such a monopoly entitles the plaintiff to any relief. In certain areas the state and Federal Government have found it necessary and proper to grant such legal monopolies such as, for example, telephone companies where it would not be feasible to have ten different telephone companies in a community trying to operate lines, gas company, electrical distribution company and other

* * *

what did or did not happen prior to January 7, 1960, as it may have been shown by the evidence in determining whether defendant was, or as it may have any bearing on the issue of whether the defendant was guilty of any

[559] anti-trust violation after that date, or whether the defendant was innocent of any such violation after that date, all to the extent that such evidence may be rele-

vant or may be material to that question.

Let me turn your attention now to the plaintiff's contention that the defendant has monopolized the relevant market. The word "monopolize" or "monopolizing" as is used in the statute that I have read to you and which is made illegal under the terms of the Sherman Anti-Trust Act, consists of the possession of a monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product or a business acumen or historic accident. It is the existence of a monopoly power coupled with the intent to use it for anti-competitive or monopolistic purposes or with the inevitable anti-competitive effect that establishes monopoly or a monopolization as that word is used in the statute. In other words, monopolizing means to acquire or to maintain the power to exclude actual or potential competition from the field accompanied with the intent or the purpose to exercise that power. In other words, both elements must be found to exist. A monopoly violation presupposes exclusive possession or control by a person or organization or the means and practices by which if attempted the person or organization could gain exclusive possession or control of a market to the exclusion of all other
[560] actual or potential competitors. This is what we are referring to when we talk about monopoly power. Monopoly power is the power to control prices or to exclude

* * *

THE COURT: Gentlemen, have you been able to arrive at a verdict yet upon all issues?

FOREMAN: No, sir.

THE COURT: All right. Is there any matter in which the Court can be of assistance to you?

FOREMAN: Yes, sir, I have one clarification—

THE COURT: Be careful please in stating any proposition to the Court not to reveal the deliberations of the jury. That would not be proper, but if there is any question of law or any explanations or instructions, I'll be more than happy to—

FOREMAN: Sir, we would like to be clarified more on this portion of the second count, to have a better definition for us, of this portion of it for an attempt to monopolize in violation of the Sherman Anti-Trust Act.

THE COURT: All right.

One theory upon which the plaintiff seeks to recover is that the defendant has attempted to monopolize the relevant market, that is the heating and cooling market in the residential, light industrial and commercial field. This theory of the plaintiff, of course, is based upon Section 2 of the Sherman Act which makes it a violation of the law to attempt to monopolize. The term attempt to monopolize as [578] used in the Federal Anti-Trust laws involves two essential elements. One is that the defendant must have been shown to have had the specific intent to monopolize; that is, that the defendant gas company must have intended to monopolize this heating and cooling market, and second, that the defendant, Chattanooga Gas Company, must have done some act in fulfilling that intent or in carrying out that purpose but insufficient to actually have produced the intended monopoly. In other words, the law distinguishes in this particular instance between having actually acquired a monopoly and intending to acquire a monopoly, and as I understand your inquiry as directed to the Court. Now just to the phase of the case that involved the allegation that the defendant, Chattanooga Gas Company, intended or attempted rather to monopolize. In order to find an attempt to monopolize, you must find both

elements, namely an intent on the part of the defendant to monopolize and some act or acts upon their part in fulfilling that intent, and it must appear that together they result in a reasonable probability that monopolization will sooner or later occur. While only a general intent is necessary to show monopolization, where the charge is an attempt to monopolize, the intent must be shown to be the specific intent to gain control over the relevant market and to exclude competitors from that market. The specific intent required to show an attempt to monopo-
[579] lize is a specific subjective intent to gain a monopoly and to destroy competition, so that one relevant inquiry insofar as the second issue is concerned, will be for the jury to determine whether under all of the evidence —a preponderance of the evidence—shows that the defendant did attempt to monopolize the field and did so, and that a preponderance of the evidence shows that they intended to monopolize the field and did some act in furtherance of that attempt.

Now, does that or not answer the question that you may have had?

FOREMAN: Yes, sir. Could they be guilty without—

THE COURT: Don't reveal what your own thinking may be—that wouldn't be proper.

FOREMAN: *Could they be guilty without intent*?

THE COURT: The defendant, Chattanooga Gas Company, could not be guilty of attempting to monopolize the heating and cooling market in home, commercial and light industrial, which is the relevant market, they could not be guilty of attempting to do that unless they had, from a preponderance of the evidence it was shown that they intended to do just that. So it will be up to the jury to look to all of the evidence and attempt to determine on that issue what was the intention of the defendant. All right.

Now, gentlemen, when I give you these specific
[580] instructions on some phase of the case, don't fail to bear in mind all of the instructions on all phases of the case that I have given to you because you should bear all of those instructions in mind in making your decision. (JURY OUT FOR DELIBERATION.)

THE COURT: All right, gentlemen, is there anything further in connection with the additional instructions of the Court?

MR. CHAMBLISS: Your Honor, I may be wrong, but I got the impression from the last question relating to whether or not it is possible, if the monopoly was in existence, whether it was required that specific intent also be—

THE COURT: Well, will you play back and see what the question was please?

(REPORTER PLAYS BACK PORTION REQUESTED BY COURT.)

THE COURT: Does that answer your question raised?

MR. CHAMBLISS: I'm not sure, your Honor. *I had the impression at the time that he wanted to know if they could be guilty of a monopoly without intent*, and it sounded like can they be guilty without intent, and I don't know whether he meant a monopoly in being or cause he meant a monopoly by attempt, and your explanation made it very clear that the explanation only applied to the attempt.

THE COURT: Yes, and then I also—that's the reason I added to my instruction the matter that they should
[581] bear in mind all of my previous instructions and not limit themselves just to these supplementary

* * *

MATERIAL ON NATIONAL IMPORTANCE OF THE QUESTION

* * *

RESOLUTION OF

SHEETMETAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, INC.

Adopted November 30, 1967 in
San Diego, California

"Be it resolved that SMACNA officially take a position in favor of such action including legislative, administrative and judiciary proceedings which would eliminate unfair competitive practices by regulated utility companies."

EXCERPT FROM PROCEEDINGS OF THE 85th ANNUAL CONVENTION

of the

NATIONAL ASSOCIATION OF PLUMBING-HEATING-COOLING CONTRACTORS

1967

"RESOLUTION NO. 1

"SPONSORS: Ohio; Kansas; Arizona; Northwestern Ohio; Missouri; Billings, Montana; Mississippi; Indiana; North Carolina; Oklahoma; Alabama; Kentucky; West Virginia; Massachusetts; Texas; Georgia; Tennessee; Minnesota; Metropolitan Detroit and Michigan; Arkansas and Florida.

"WHEREAS: The public utility companies have been and are now competing with the plumbing-heating-cooling contractors in the sale at retail and installation of plumbing-heating-cooling appliances and equipment; and

"WHEREAS: Such competition is of grave concern to and has caused or will cause irreparable injury to the plumbing-heating-cooling contractors; and

"WHEREAS: In many cases such competition has been pursued and carried on by the public utility companies in a manner and to an extent

believed to violate the proscriptions of applicable law, including the Federal Trade Commission Act, all as more particularly set forth in the application for a complaint against the public utility companies filed by this Association with the Federal Trade Commission; and

"WHEREAS: The members of this Association urgently support the filing of such application for a complaint and concur in the imperative need for the relief prayed for therein; now therefore be it

"RESOLVED: That the National Association of Plumbing-Heating-Cooling Contractors continue and persevere in its efforts through all available legal and proper means to insure that plumbing-heating-cooling contractors may be able on fair terms and in accordance with law to compete with the public utility companies in the sale at retail and installation of plumbing-heating-cooling appliances and equipment.

Mr. Chairman, your Committee concurs in this resolution."

AGENDA

HOUSE SMALL BUSINESS COMMITTEE

SUBCOMMITTEE ON REGULATORY AND ENFORCEMENT AGENCIES

HEARINGS ON PROMOTIONAL PRACTICES BY PUBLIC UTILITIES AND THEIR IMPACT UPON SMALL BUSINESS

SCHEDULE OF WITNESSES

Tuesday, March 19, 1968
10:00 a.m.

1. Senator Lee Metcalf (D-Montana)
2. Mr. James E. Ray
   Spokesman for The Sheet Metal and Air Conditioning Contractors National Association (SMACNA)
3. Joseph Paquette
   East Hartford, Connecticut
4. John Ricca
   Oakton, Virginia
5. Jack Luskin,
   Appliance Retailer
   Baltimore, Maryland

EXCERPTS FROM STATEMENT OF JAMES E. RAY before Subcommittee No. 5

ACTIVITIES OF REGULATORY AGENCIES RELATING TO SMALL BUSINESS

John D. Dingell, Chairman

Mr. Chairman, members of the Subcommittee, Counsel; my name is James E. Ray and I am Manager of the Central Georgia Sheet Metal Contractors Association, Inc.— Chapter of the Sheet Metal and Air Conditioning Contractors National Association, Inc. Accompanying me is James H. Ferguson, Director of Industry Relations of the Sheet Metal and Air Conditioning Contractors National Association.

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SMACNA, now celebrating its 25th anniversary, is the official spokesman for the sheet metal and air conditioning industry, which is composed of approximately 8,000 small businessmen. While these firms are an integral and important partner in the huge construction industry, individually they employ on the average less than 10 journeymen and/or apprentices each.

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Up to this point I have been talking about experiences I have personal knowledge of in East Tennessee. However,

I assure you these practices are prevalent in most areas of the country as evidenced in meetings of our national chapters and by correspondence we have received. I would like to quote a portion of a letter from a St. Louis, Missouri contractor.

"We have more than enough competition from our large chain stores with their tremendous purchasing power, without competition from Laclede Gas Company here in St. Louis. Both the chain store and the gas utility have other means of making a profit. The chain department store has many other items to sell after the customer is lured into his store by baited air conditioning ads. The gas utility has his natural gas fuel to sell.

"While both are unfair competition the latter is by far the worst because he sells each piece of heating and air conditioning equipment below his cost to increase the gas load for the gas utility company. He cannot lose money because he can always apply to the Public Service Commission and receive a rate increase when his profits drop below normal.

"With every Laclede Gas Co. sale of gas air conditioning equipment and its accompanying losses, I, as a user of gas fuel in my home and place of business, find, that I am subsidizing the losses of my competitor. I am paying more for my natural gas fuel to cover their losses. The loss is estimated at approximately $700 per sale by Laclede Gas. Every gas user on the gas pipe lines are paying more for gas fuel to cover these losses.

"As an Air Conditioning Contractor I am also losing a potential sale and a fair profit from that sale, when Laclede Gas Co. sells air conditioning.

"Please do your best to bring about relief from this unfair situation here and in other areas of the country."

Another St. Louis Contractor states:

"In St. Louis and St. Louis County it is virtually impossible for a Sheet Metal & Air Conditioning Contractor to bid a complete gas air conditioning job. The Laclede Gas Company advertises, promotes and quotes all the gas air conditioning in this area at prices we contractors cannot meet. They also make it easy for the customer by financing and letting the customer pay this along with his regular monthly gas bill."

A letter from a contractor in Ogden, Utah says:

"Our local gas and electric companies are promoting their respective fuels and each are offering cash kickbacks to the owner if they will use their product exclusively. No small business distributors could afford to do this. In addition, they are employing a large number of people to do the sales contract work that private industry should be doing. This is all being financed the utility revenues from the private consumer.

"In many cases the bidding of a project is delayed several weeks, while the confused owner tries to ferret out the propaganda and enticements given him by the utility company representatives, each vying for his business.

"Each fuel has its place and each given job should be studied for its own merit. This is not being done, nor can be done, until the utility companies are either rested from this type of activity, or required to show profit on that phase of their business as a private enterprise would have to do."

From the Phoenix, Arizona Chapter of SMACNA:

"The Air Conditioning Contractors of Arizona have great concern on the question of Utility competition with our Contractors.

"The Salt River Project Government Co-op which competes with Arizona Public Service states that they too, would sell, install and service equipment if their competitors did so.

"The Southern Union Gas Company which operates in Flagstaff, Arizona, has a show room for Air Conditioning equipment. Their Company also sells, installs and services air conditioning equipment. The Company, whose principle office is in Las Vegas continues to promote these services even though we have protested their action.

"There is another Company whose headquarters are in Texas that was doing something as Southern Nevada until a protest was made by Pipe Trades to the Corporation Commission.

"The Air Conditioning Contractors of Arizona feel a very grave concern about the type of competition which is subsidized by the Utility through its' rate structure. The Flagstaff firm will sell the equipment direct as indicated and will bill the customer monthly with his electrical bill.

"All of the Contractors in the State of Arizona are greatly disturbed by this unfair competition. We strongly urge SMACNA opposing any bill in which the competitor has a monopoly and is protected by reason of it being a Utility."

The Minneapolis—St. Paul Chapter writes:

"In Minneapolis the Minnegasco people promote, sell and install gas lights, appliances, etc. Air conditioners are sold by them, but a flat cost for installation is given to only about two different contractors (one a member of ours); he only makes the connections and the Gas Company pays him for the labor and a small commission (we guess). The service from there on and forever is handled by the Gas Company. This operation has bugged many of our contractors and they all agree that something should be done to get the Gas Utility out of the merchandising field. It is using its guaranteed profit system to control the market, and make no mistake about it.

"The Electric Utility has given the local electrical contractors a bad time also. We do not believe a monopoly should be allowed to compete with legitimate business people in any manner. They are power suppliers only, protected by the government with a guaranteed profit and that should be the extent of their activities.

"The public utilities will claim private business does not promote local building fast enough to suit them, but private merchandisers do not have a bottomless barrel of money to hire B.T.U. and K.W. chasers. If the government will guarantee our profit, I am sure we can and will do a better job than they now do."

From Crystal Lake, Illinois:

"I'm writing to you as president of the Fox Valley Sheet Metal Employers Association, to ask how you're getting along with your lawsuit against the gas company. We are as an organization concerned that the gas company is encroaching too far in our business by selling air conditioning and heating equipment direct."

An Akron, Ohio contractor comments:

"Noted in refrigeration news that Gas Company representatives contend that its purpose in selling equipment below cost was done in face of cheap TVA power competition.

"In Ohio there is no TVA competition but the gas utilities sell equipment at cost or below. It seems to be a vicious national policy."

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NATIONAL OIL FUEL INSTITUTE, INC.
60 East 42nd Street
New York, N. Y. 10017

April 30, 1968

Mr. John I. Foster
Maclellan Building
Broad Street
Chattanooga, Tennessee

Dear John:

We at NOFI were quite disappointed to learn of the decision rendered by the Circuit Court of Appeals rejected your appeal in the Southern Blowpipe Case.

We wish the court had rendered a written opinion dealing with the tremendously important ruling of law which if

not resolved in favor of the small businessman could lead to his extinction.

The court in not having rendered an opinion leaves open for further consideration the problem of whether or not utilities, in engaging in business other than the franchise monopoly originally granted to them by local governments, can, as an extension, engage in other businesses and treat business losses thereunder in their rate base.

NOFI for years has been supporting its chapters throughout the country which have endeavored to curtail these practices through efforts in their particular states. These efforts have rarely been successful.

Actions have been pursued before regulatory bodies and courts in increasing frequency during the past several years. In most instances where the action has been predicated on the damaging effect of utility practices upon small business, the resulting decisions have denied jurisdiction. This is the basic reason for the Congressional hearings now investigating unfair trade practices of utilities.

Under separate cover we are forwarding pertinent statements of Senators Metcalf and E. M. Kennedy made before this committee during the last month.

In behalf of our 8,000 retailers we urge you to continue to seek judicial consideration of the vital issues at stake. This matter, if left unsettled can easily result in the limitation and throttling of competition in those areas outside the utility franchise granted to such monopolies.

Sincerely,

/s/ George Gruberg
George Gruberg
General Counsel

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